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***Elecontronically filed
July 27, 2006***

Attorneys for Leo G. Mantas and Others

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

**In re:
USA COMMERCIAL MORTGAGE COMPANY,
Debtor.**

**Case No. BK-S-06-10725 LBR
Case No. BK-S-06 10726 LBR
Case No. BK-S-06 10727 LBR
Case No. BK-S-06-10728 LBR
Case No. BK-S-06-10729 LBR**

**In re:
USA CAPITAL REALTY ADVISORS, LLC,
Debtor.**

**In re:
USA CAPITAL DIVERSIFIED TRUST DEED FUND,
LLC,
Debtor.**

Chapter 11

**In re:
USA CAPITAL FIRST TRUST DEED FUND, LLC,
Debtor.**

**Jointly Administered Under
Case No. BK-S-06-10725 LBR**

**In re:
USA SECURITIES, LLC,
Debtor.**

**Hearing Date: August 4, 2006
Hearing Time: 9:30 a.m.**

Affects:
☐ All Debtors
☒ USA Commercial Mortgage Company
☐ USA Securities, LLC
☐ USA Capital Realty Advisors, LLC
☒ USA Capital Diversified Trust Deed Fund, LLC
☒ USA First Trust Deed Fund, LLC

**MANTAS GROUP'S JOINDER IN STANLEY
ALEXANDER AND OTHER INTERESTED
PARTIES' PARTIAL OPPOSITION TO
DEBTOR'S MOTION TO DISTRIBUTE FUNDS
AND TO GRANT ORDINARY COURSE
RELEASES AND DISTRIBUTE PROCEEDS.**

Come now the Mantas Group in Joinder with the Partial Opposition to Debtor's Motion to Distribute Funds and to Grant Ordinary Course Releases and Distribute Proceeds filed by Stanley Alexander and

1 others by and through their attorney, Robert C. LePome, Esq., and hereby partially oppose the Debtor's Motion
2 to Distribute Funds and to Grant Ordinary Course Releases and Distribute Proceeds. This Joinder is based
3 upon the Points and Authorities attached hereto.

4
5 BOLICK & BOYER

6 By: /s/ Erven T. Nelson
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10 **POINTS AND AUTHORITIES**

11 **The Law**

12 **I. Trust Law.**

13 In support of it's Motion to Distribute Funds and to Grant Ordinary-Course Releases and Distribute
14 Proceeds filed July 7, 2006, the Debtor cites § 254 of the Restatement of Trusts. The section provides as
15 follows:

16 If the trustee has made a payment out of trust property to one of several beneficiaries to which the
17 beneficiary was not entitled, such beneficiary is personally liable for the amount of such
overpayment, and his beneficial interest is subject to a charge for the repayment thereof, unless
18 he has so changed his position that it is inequitable to compel him to make repayment.
(Emphasis supplied).

19 The Debtor relies on the above provision as support for its argument that funds rightfully due to lenders but
20 which have yet to be paid should be offset by past advances allegedly made in respect of non-performing loans.
21 But, the Lenders (i) did not receive funds they were not entitled to receive, and (ii) have changed their positions
22 by using the funds for living expenses. Assuming without conceding that the Loan Services Agreements

1 (“Agreements”) entered into between USA Commercial Mortgage Company (“USA”) and various direct lenders
2 served to create a trust relationship such that trust principles are applicable to the present case, it is respectfully
3 submitted that Debtors have misinterpreted the legal significance of the above provision.

4 Section 254 of the Restatement of Trusts applies to payments of trust property made to “one of several
5 beneficiaries”. In the present case, if USA does hold funds paid by borrowers as a trustee for a lender, it does
6 so as trustee of over 100 parallel trusts arising from over 100 separate loans. If, for example, one lender in a
7 specific loan had received more than it was entitled to receive vis-à-vis the other lenders in that specific loan,
8 then § 254 would require the overpaid lender to disgorge funds unless it had changed its position so as to make
9 repayment inequitable. There is nothing explicit in the Agreement, or implicit in the financial arrangements
10 between USA, the lenders and the borrowers pursuant thereto, however, that could support a finding that each
11 individual lender is one of a larger group of beneficiaries consisting of all the lenders in over 100 loans with
12 whom USA had contracted; merely sharing a common trustee does not create such a result. Thus, § 254 of the
13 Restatement of Trusts is inapplicable to the present situation.

14 Furthermore, the policy reasons that support the principle annunciated in § 254 as it applies to “one of several
15 beneficiaries” do not apply to the present case. In this regard, it is important to note that a trustee has a duty to
16 administer a trust solely for the benefit of the beneficiaries of that specific Trust. Section 170 of The
17 Restatement of Trusts provides as follows:

- 18 (1) The trustee is under a duty to the beneficiary to administer the trust solely in the interest of
19 the beneficiary.

20 To allow a trustee to require a particular beneficiary (“Beneficiary A”) who is one of a group of beneficiaries in a
21 specific Trust to account for any payments received to which it was not entitled is consistent with the fiduciary
22 duties owned by that trustee to each of the beneficiaries of the trust. However, to allow a trustee to recoup
23 monies it paid out to a Beneficiary A so that it can pay beneficiaries from a separate trust which also happens to
24

1 be administered by the same trustee, at the expense of Beneficiary A, would be a breach of the trustee's duty to
 2 act in the best interest of Beneficiary A. This is particularly so in the present case where any "overpayments"
 3 made to Beneficiary A were made in breach of USA's own contractual obligations pursuant to paragraph 2(c)(i)
 4 of the Agreement and fiduciary duties under trust and agency law. The paragraph states as follows, in part:

5 (2) Services of USA in Connection with Servicing the Loans. Subject to and in accordance with
 6 the terms and conditions set forth in this Agreement, and all applicable laws, Lender instructs
 and authorizes USA to, and USA will perform the following services in connection with servicing
 each of the Loans:

7 ...

8 (c) Until the total amount due under each note is paid in full:

9 (i) Proceed diligently to collect all payments due under the terms of the note and
 10 promptly pay the proper parties, *when and if due*, principal, interest, late
 charges, insurance and other specified funds. (emphasis added)

11 The suggested offsetting of payments which are now rightfully due to a lender from a particular
 12 borrower, with payments made by USA which that lender received in good faith, has no basis in trust law and
 would, in effect, force individual lenders to pay for USA's failure to live up to its own contractual obligations.

13 II. Agency Law.

14 The recoupment proposed by the debtor likewise finds no legal justification in agency law. The scope of
 15 USA's authority as agent of the lenders was specifically outlined in paragraphs 1 and 2 of the Agreement. The
 16 proposed offsetting of payments rightfully due to a lender with payments that the lender received in good faith in
 17 the past would be outside of the authority granted to USA as set out in the Agreement. On this point, the
 18 Restatement (Second) Agency, § 33 (1958) states as follows:

19 An agent is authorized to do, and to do only, what is reasonable for him to infer that the
 20 principal desires him to do in the light of the principal's manifestations and the facts as he
 knows or should know them at the time he acts.

21 Thus, established principles of agency law preclude USA from taking any action beyond that which the
 22 lenders desire. Furthermore, when an agreement specifies particular powers of an agent, as in the

Likewise in *Schmitz v. Firststar Bank Milwaukee*, 260 Wis.2d 24 36 (2003), the Court noted:

9 Nothing in the Loan Servicing Agreement specifically authorizes USA to proceed with the proposed
10 offsetting of funds or recoupment. Based on the above, a strict reading of the powers specified in paragraphs 1
 and 2 precludes extending USA's powers as agent so as to allow the proposed offsetting.

No offsetting should be allowed as to these objecting parties.

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